No. 99-1235

Supreme Court, U.S.
FILED
JUN 8 2000
CLERK

IN THE
Supreme Court of the United States

GREEN TREE FINANCIAL CORP.—ALABAMA,
AND GREEN TREE FINANCIAL CORPORATION,
Petitioners,

v.

LARKETTA RANDOLPH,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF *AMICUS CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF PETITIONERS

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June 2000

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

24/08

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BRIEF *AMICUS CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF PETITIONERS

The Equal Employment Advisory Council respectfully submits this brief *amicus curiae*.[1] The written consent of all parties has been filed with the Clerk of this Court. The brief urges reversal of the decision below and thus supports the position of Petitioners before this Court.

[1] Counsel for *amicus curiae* authored this brief in its entirety. No person or entity, other than the *amicus curiae*, its members, or its counsel, made a monetary contribution to the preparation or submission of the brief.

INTEREST OF THE *AMICUS CURIAE*

The Equal Employment Advisory Council (EEAC) is a nationwide association of employers organized in 1976 to promote sound approaches to the elimination of discriminatory employment practices. Its membership now includes more than 325 of the nation's largest private sector companies, collectively providing employment to more than 17 million people throughout the United States. EEAC's directors and officers include many of industry's leading experts in the field of equal employment opportunity. Their combined experience gives EEAC an unmatched depth of knowledge of the practical, as well as legal, considerations relevant to the proper interpretation and application of equal employment policies and requirements. EEAC's members are firmly committed to the principles of nondiscrimination and equal employment opportunity.

All of EEAC's members are employers subject to the Age Discrimination in Employment Act of 1967 (ADEA), *as amended*, 29 U.S.C. § 621 *et seq.*, Title VII of the Civil Rights Act of 1964 (Title VII), *as amended*, 42 U.S.C. § 2000e *et seq.*, and other equal employment statutes and regulations. Many of EEAC's members have contracts with their employees governing some or all terms and conditions of employment. Some of these contracts include agreements to arbitrate disputes arising out of the employment relationship including statutory claims of discrimination.

EEAC's members have an ongoing interest in preserving the enforceability of agreements calling for arbitration of employment-related disputes. Arbitration provides a fair, efficient, and effective means of resolving discrimination claims and other employment-related issues that otherwise would clog the courts. Because of its interest in this subject, EEAC has filed friend-of-the court briefs in numerous cases

supporting the enforceability of arbitration agreements, as well as many other important issues of employment law.[2]

Thus, the issues presented in this appeal are extremely important to the nationwide constituency that EEAC represents. While the case arose in the context of a commercial arbitration agreement, this Court's decision is likely to affect agreements to arbitrate employment-related claims as well. EEAC thus has an interest in, and a familiarity with, the legal and public policy issues presented to the Court in this case. Because of its significant experience in these matters, EEAC is uniquely situated to brief this Court on the importance of the issues beyond the immediate concerns of the parties to the case.

STATEMENT OF THE CASE

Respondent Larketta Randolph financed her purchase of a mobile home through Petitioner Green Tree Financial Corp. —Alabama, which is a wholly-owned subsidiary of Petitioner Green Tree Financial Corporation (hereinafter collectively "Green Tree."). Pet. App. 2a. Her retail installment contract with the seller of the mobile home, which names Green Tree as the assignee, provides for binding arbitration of "[a]ll disputes, claims, or controversies arising from or relating to this Contract . . . ." Pet. App. 2a-3a.

Two years later, Randolph sued Green Tree, claiming (1) that the financing documents violated the Truth in Lending Act, 15 U.S.C. § 1601 *et seq.* (TILA), because the required TILA disclosure statement did not state that she was required to obtain "vendor's single interest insurance," (2) that the documents violated the Equal Credit Opportunity Act, 15 U.S.C. §§ 1691-1691f, by requiring arbitration of disputes, and (3) that TILA precludes arbitration of TILA claims. Pet. App. 4a. Green Tree moved to compel arbitration and to stay

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[2] *E.g., Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991).

or dismiss the action. *Id.* The district court granted the motion to compel and dismissed all of Randolph's claims with prejudice. Pet. App. 4a-5a. Randolph appealed, and Green Tree moved to dismiss the appeal for lack of jurisdiction. Pet. App. 5a.

The Eleventh Circuit heard the appeal and reversed the district court's ruling. First, the Court of Appeals concluded that it had jurisdiction, holding that the district court's order was an appealable "final decision" under § 16(a)(3) of the Federal Arbitration Act (FAA), 9 U.S.C. § 16(a)(3). Pet. App. 15a. Second, the Court of Appeals ruled that the arbitration agreement was unenforceable because it was silent as to the payment of arbitration fees and costs, making it possible that "Randolph might be required to bear substantial costs of the arbitration even if she were to prevail . . . ." Pet. App. 19a. This Court granted *certiorari.*

SUMMARY OF ARGUMENT

The majority view, that an order compelling arbitration under the Federal Arbitration Act, 9 U.S.C. §§ 1-16, is an appealable order only if it is issued in an "independent" proceeding, is the only logical approach. Under that view, the order in the instant case, which was "embedded" in a broader proceeding, was interlocutory and not appealable, so that the court below lacked jurisdiction to hear the appeal.

The court below further erred in concluding that an arbitration agreement that is "silent" on the allocation of fees and costs is unenforceable. First, the federal policy favoring arbitration requires that doubts be resolved in favor of enforcing the agreement, and the court below did just the opposite. Second, the court below mistakenly assumed that cost-sharing among the parties, at least initially, prevents complainants from being able to vindicate their statutory rights. This view is contrary to the opinions of three other circuit courts of appeals as well as a respected government

Commission, a multifactional task force that issued "due process" standards for employment arbitration, the primary national organizations supplying arbitrators, and others.

ARGUMENT

I. THE VIEW OF THE MAJORITY OF THE CIRCUIT COURTS OF APPEALS, THAT AN ORDER COMPELLING ARBITRATION IN AN "EMBEDDED" PROCEEDING IS INTERLOCUTORY AND NOT APPEALABLE, IS CORRECT AND SHOULD BE ADOPTED BY THIS COURT

As the court below acknowledged, a substantial majority of the circuit courts of appeals would have concluded that they lacked jurisdiction to hear the appeal in the instant case. By adopting the opposite view, the Court of Appeals placed itself in the minority and outside the realm of logic.

The Federal Arbitration Act (FAA), 9 U.S.C. §§ 1-16, was intended "to reverse the longstanding judicial hostility to arbitration agreements that had existed at English common law and had been adopted by American courts, and to place arbitration agreements upon the same footing as other contracts." *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991) (citations omitted). The FAA "was designed to overcome an anachronistic judicial hostility to agreements to arbitrate, which American courts had borrowed from English common law." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 625 n.14 (1985) (citations omitted).[3] The Act reflects a "'liberal federal

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[3] The key provision of the FAA is Section 2, which provides;

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an

policy favoring arbitration agreements' . . . guaranteeing the enforcement of private contractual arrangements . . . ." *Id.* at 625 (citations omitted). Indeed, "'[t]he preeminent concern of Congress in passing the Act was to enforce private agreements into which parties had entered,' a concern which 'requires that [this Court] rigorously enforce agreements to arbitrate.'" *Id.* at 625-26 (citation omitted).

First passed in 1925, the FAA was amended in 1988 to specify when an appeal can and cannot be taken from a district court order. Pub. L. 100-702, Title X, § 1019(a), Nov. 19, 1988, 102 Stat. 4671, § 15 (renumbered Pub. L. 101-650, Title III, § 325(a)(1), Dec. 1, 1990, Stat. 5120, now 9 U.S.C. § 16). The statute now provides that:

> (a) An appeal may be taken from—
>
> (1) an order—
>
> (A) refusing a stay of any action under section 3 of this title,
>
> (B) denying a petition under section 4 of this title to order arbitration to proceed,
>
> (C) denying an application under section 206 of this title to compel arbitration,
>
> (D) confirming or denying confirmation of an award or partial award, or
>
> (E) modifying, correcting or vacating an award;

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agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. § 2 (1999 & Supp. 2000).

(2) an interlocutory order granting, continuing, or modifying an injunction against an arbitration that is subject to this title; or

(3) a final decision with respect to an arbitration that is subject to this title.

(b) Except as otherwise provided in section 1292(b) of title 28, an appeal may not be taken from an interlocutory order—

(1) granting a stay of any action under section 3 of this title;

(2) directing arbitration to proceed under section 4 of this title;

(3) compelling arbitration under section 206 of this title; or

(4) refusing to enjoin an arbitration that is subject to this title.

9 U.S.C. § 16 (1999 & Supp. 2000). The statute thus authorizes an appeal in cases in which the district court has disallowed arbitration, 9 U.S.C. § 16(a)(1) and (2), and denies an appeal where the district court has allowed the arbitration to proceed. 9 U.S.C. § 16(b).

As the court below observed, the courts of appeals are divided as to the meaning of § 16(a)(3) and what constitutes a "final decision" in this context. Indeed, the court below acknowledged the eight circuits that have ruled that § 16(a)(3) does not permit an appeal of an order compelling arbitration where the arbitration issue is "embedded" in a broader proceeding. In the view of these circuits, an appeal is authorized only if the order compelling arbitration is "independent" —that is, it stands alone as the sole issue in the case. Pet. App. 7a – 8a. Three circuits—the Sixth, the Tenth, and now the Eleventh—read § 16(a)(3) as permitting an appeal even in an "embedded" proceeding where the trial

judge has dismissed the case rather than merely granting a stay pending arbitration. Pet. App. 9a.

The majority view is more in keeping with the rest of § 16, since it allows arbitration to proceed without further delay where there are issues to be arbitrated. Moreover, the majority view provides a logical, systematic way of distinguishing which cases are appealable and which are not, in a way that furthers the federal policy favoring arbitration.

In contrast, the minority's approach effectively creates an anomaly that depends solely on how the district court characterizes the end of its current involvement in the case. If the district court dismisses the action, in the minority view the decision is "final" and therefore appealable, but if the court merely stays the action, it is not. Since in either case the district court has ruled in favor of arbitration, its disposition of the remainder of the case, which should not affect the next stage, in fact dictates how the case should proceed. This seems illogical.

Sections 3 and 4 of the FAA, 9 U.S.C. §§ 3 and 4, are the logical comparators here. Section 3 provides for a court to stay a pending action if it is subject to arbitration. If the court refuses a stay, the order is immediately appealable under § 16 (a)(1)(A). If the court grants the stay, the order is not appealable, pursuant to § 16(b)(1). Similarly, Section 4 allows a party seeking to enforce an arbitration agreement to petition the district court for an order compelling arbitration. If arbitration is denied, the order is immediately appealable under § 16(a)(1)(B). If the petition is granted, however, the order is interlocutory and not appealable, pursuant to § 16(b)(2).

The entire thrust of the FAA is towards facilitating the parties' agreement to arbitrate their disputes. The common sense interpretation of § 16(a)(3), then, is to allow arbitration to proceed forthwith if there are merits issues for the

arbitrator to decide, and to allow an immediate appeal only if arbitration has been denied, or if the only issue anywhere near the table is whether or not to arbitrate, *e.g.* a declaratory judgment proceeding concluding that an arbitration agreement is valid and enforceable as to future disputes that have yet to arise. The Eleventh Circuit's decision to the contrary is illogical, given this Court's prior interpretations of the FAA, and should be reversed.

II. AN ARBITRATION AGREEMENT NEED NOT ALLOCATE THE ARBITRATION COSTS TO BE ENFORCEABLE

The court below ruled that the arbitration agreement was unenforceable because it was silent as to the allocation of arbitration fees and costs. This conclusion directly contravenes the federal policy favoring arbitration and is unsupportable.

A. The Federal Policy Favoring Arbitration Requires That Doubts Be Resolved in Favor of Enforcing an Agreement To Arbitrate

As this Court has recognized repeatedly, "[the FAA's] provisions manifest a 'liberal federal policy favoring arbitration agreements.' " *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 25 (1991) (quoting *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983)). Accordingly, " 'questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration.' " *Id.* at 26 (quoting *Moses H. Cone Mem'l Hosp.* at 24).

This Court's decision in *Gilmer*, holding that statutory discrimination claims may be subject to compulsory arbitration by agreement, made it clear that as a general rule, "[h]aving made the bargain to arbitrate, the party should be held to it unless Congress itself has evinced an intention to

preclude a waiver of judicial remedies for the statutory rights at issue." *Id.* (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985)). Indeed, this Court unequivocally rejected Gilmer's general challenges to the arbitration process as an adequate means of vindicating statutory rights, even those under statutes "designed to advance important public policies." Quoting *Mitsubishi Motors*, this Court stated that "[s]o long as the prospective litigant effectively may vindicate his or her statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function." *Gilmer*, 500 U.S. at 28 (*quoting Mitsubishi Motors*, 473 U.S. at 637).

The lesson of *Gilmer* and its antecedents is that if there is a way to enforce the agreement, the court should do so, resolving doubts in favor of arbitration. The U.S. Court of Appeals for the District of Columbia Circuit did exactly that in *Cole v. Burns International Security Services*, 105 F.3d 1465 (D.C. Cir. 1997). Despite its disapproval of the arbitration agreement's silence on the allocation of costs, the D.C. Circuit enforced the agreement. Having determined that "ambiguity in a contract should be resolved against the drafter—here, the employer—and ambiguity should be resolved in favor of a legal construction of the parties' agreement," *id.* at 1468, the D.C. Circuit concluded, "we interpret the arbitration agreement at issue as requiring Burns to pay all arbitrators' fees associated with the resolution of Cole's claims," *id*, and sent the case to arbitration.

The court below took the exact opposite approach. Rather than construing the agreement in a way that allowed it to be upheld, the court below resolved its doubts against arbitration. For this reason alone, the decision below must be reversed.

B. It Is Common, and Appropriate, for an Arbitration Agreement To Permit or Require Cost-Sharing Among the Parties

In reaching its erroneous conclusion, the Court of Appeals started from the mistaken premise, shared by the D.C. Circuit in *Cole* and the Tenth Circuit in *Shankle v. B-G Maintenance Mgmt. Inc.*, 163 F.3d 1230 (10th Cir. 1999) (holding an employment arbitration agreement unenforceable because it required the employee to pay half of the arbitrator's fees), that requiring complainants to shoulder some of the arbitrator's fee somehow trammels their statutory rights. This view is at odds with the holdings of other courts, as well as with the prevailing wisdom of those who have studied arbitration systems.

For example, in *Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 170 F.3d 1 (1st Cir. 1999), the First Circuit found the New York Stock Exchange's (NYSE) arbitration procedures adequate to resolve employment discrimination claims under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, despite the contention that "plaintiffs are charged forum fees, which may be as high as $3,000 per day and tens of thousands of dollars per case." 170 F.3d at 15. In the First Circuit's analysis (1) "[n]othing in the choice of arbitration mandates these outcomes, nor are such outcomes necessary concomitants of the NYSE arbitral system," *id.* (2) "it does not appear to be the usual situation that a plaintiff is asked to bear forum fees," *id.*, since "NYSE arbitrators possess discretion to award costs and fees when they decide a dispute," *id.* at 16; and (3) "if unreasonable fees were to be imposed on a particular employee, the argument that this was inconsistent with [the underlying statute] could be presented by the employee to the reviewing court." *Id.* In other words, as the First Circuit explained, just because plaintiffs theoretically *could* be required to pay forum fees is no reason to believe that they ultimately *will*,

and thus is no reason to refuse to enforce the agreement. *See also Koveleskie v. SBC Capital Mkts., Inc.*, 167 F.3d 361, 366 (7th Cir.) (applying *Rosenberg*), *cert. denied*, 120 S. Ct. 44 (1999); *Williams v. CIGNA Fin. Advisors, Inc.*, 197 F.3d 752, 763 (5th Cir. 1999) (specifically disagreeing with *Cole* and *Shankle* and concluding that "*Gilmer* does not so clearly imply that no part of arbitral forum fees may ever be assessed against federal anti-discrimination claimants, although it plainly indicates that an arbitral cost allocation scheme may not be used to prevent effective vindication of federal statutory claims"), *cert. denied*, 120 S. Ct. 1833 (2000).

Indeed, in the view of several respected authorities, an arbitration program should provide for the individual to pay part of the arbitrator's fee in order to meet basic requirements of fairness. The Commission on the Future of Worker-Management Relations, known as the "Dunlop Commission," concluded that the fairness and quality standards it prescribed for private arbitration mechanisms required that "[t]o ensure impartiality of the arbitrator, both the employee and the employer should contribute to the arbitrator's fee. Ideally, the employee contribution should be capped in proportion to the employee's pay, so as to avoid discouraging claims by lower-wage workers." Commission on the Future of Worker-Management Relations, U.S. Dept. of Labor and U.S. Dept. of Commerce, *Report and Recommendations* (December 1994) at 32. Perhaps even more significantly, the "Due Process Protocol" issued in 1995 by a multifactional task force representing dispute resolution organizations, plaintiffs, management, labor and government, identifies equal shares as the preferred approach:

> Impartiality is best assured by the parties sharing the fees and expenses of the mediator and arbitrator. In cases where the economic condition of a party does not permit equal sharing, the parties should make mutually acceptable arrangements to achieve that goal if at all possible. In the absence of such agreement, the

> arbitrator should determine allocation of fees. The designating agency, by negotiating the parties' share of costs and collecting such fees, might be able to reduce the bias potential of disparate contributions by forwarding payment to the mediator and/or arbitrator without disclosing the parties' share therein.

A Due Process Protocol for Mediation and Arbitration of Statutory Disputes Arising Out of the Employment Relationship, Dispute Resolution Journal 37, 39 (Oct-Dec. 1995).[4]

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[4] Members of the Task Force and signatories to the Due Process Protocol were:

> Co-Chairs: Christopher A. Barreca, Partner, Paul, Hastings, Janofsky & Walker, Rep., Council of Labor & Employment Section, American Bar Association; Max Zimny, General Counsel, International Ladies' Garment Workers' Union Association, Rep., Council of Labor & Employment Section, American Bar Association; Arnold Zack, President, Nat. Academy of Arbitrators. Members: George H. Friedman, Senior Vice President, American Arbitration Association; Joseph Garrison, President, National Employment Lawyers Association; Michael F. Hoellering, General Counsel, American Arbitration Association; Charles F. Ipavec, Arbitrator, Neutral Co-Chair, Arbitration Committee of Labor & Employment Section, ABA; Wilma Liebman, Special Assistant to the Director, Federal Mediation & Conciliation Service; Lewis Maltby, Director, Workplace Rights Project, American Civil Liberties Union; Robert D. Manning, Angoff, Goldman, Manning, Pyle, Wanger & Hiatt, P.C., Union Co-Chair, Arbitration Committee of Labor & Employment Section, ABA; W. Bruce Newman, Rep., Society of Professionals in Dispute Resolution; Carl E. VerBeek, Partner, Varnum Riddering Schmidt & Howlett, Management Co-Chair, Arbitration Committee of Labor & Employment Section, ABA.

Dispute Resolution Journal (October-December 1995) at 39. Interestingly, the D.C. Circuit in *Cole v. Burns*, dismisses this diverse group as "[s]ome commentators" in rejecting their conclusion that fee-splitting is a benefit rather than a detriment. 105 F.3d at 1485 (D.C. Cir. 1997).

Likewise, the procedural rules of the two major private national organizations supplying arbitrators provide for an initial split of fees, subject to modification by the parties by agreement and ultimately subject to reallocation by the arbitrator in the award.[5] With respect to the filing fee, the current rules of the non-profit American Arbitration Association (AAA) applicable to the arbitration of employment discrimination claims state that "The filing fee shall be advanced by the initiating party or parties, subject to final apportionment by the arbitrator in the award." American Arbitration Association, *National Rules for the Resolution of Employment Disputes* (eff. January 1, 1999) at Rule 38.[6] The arbitrator's fees "shall be borne equally by the parties unless they agree otherwise, or unless the law provides otherwise." *Id.* at Rule 39. Ultimately, however, all "fees, expenses and compensation" including the arbitrator's fees are subject to assessment to "any party" by the arbitrator as part of the award. *Id.* at Rule 34. This point is repeated in the Administrative Fee Schedule accompanying the AAA Rules, which states that "Unless the parties agree otherwise, arbitrator compensation and administrative fees are subject to allocation by the arbitrator in the award." Administrative Fee Schedule, American Arbitration Association, *National Rules*

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[5] While the National Academy of Arbitrators' "Guidelines on Arbitration of Statutory Claims Under Employer-Promulgated Systems" do not specifically address the question of costs, it refers arbitrators to the "Due Process Protocol" for guidance on questions of due process. National Academy of Arbitrators, "Guidelines on Arbitration of Statutory Claims Under Employer-Promulgated Systems" (May 21, 1997) at II.F.

[6] The current filing fee for a single-arbitrator case is $500 "unless the plan provides otherwise." Administrative Fee Schedule, American Arbitration Association, *National Rules for the Resolution of Employment Disputes* (eff. January 1, 1999).

for the Resolution of Employment Disputes (eff. January 1, 1999).[7]

Similarly, the for-profit JAMS organization provides in its procedural rules for employment arbitration that "Each Party will pay its *pro-rata* share of JAMS fees and expenses . . . . unless the parties agree on a different allocation of fees and expenses." JAMS *Arbitration Rules and Procedures for Employment Disputes* at Rule 27(a).[8] While JAMS requires a pre-hearing deposit, it "may waive the deposit requirement upon a showing of good cause." *Id.* at Rule 27(b). JAMS takes the position that "[a]n employee's access to arbitration must not be precluded by the employee's inability to pay any costs or by the location of the arbitration." JAMS *Policy on Employment Arbitration—Principles of Neutrality and Minimum Standards of Procedural Fairness* at § B, Standard No. 6.[9] At the same time, JAMS clarifies that "[a]s a general matter, the sharing of arbitration costs does not violate the Minimum Standards unless the arrangement effectively *precludes* access by the employee." *Id.* (emphasis added). Accordingly, while JAMS "encourages employers to bear all or most of the costs of arbitration", it also gives employers the responsibility to "assure the employee that the arbitrator's

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[7] Notably, as the dissent in *Cole v. Burns* pointed out, 105 F.3d at 1490, the identical language appears in the Administrative Fee Schedule accompanying the 1996 version of the AAA rules at issue, so that the majority erred in concluding that "the AAA hedged on this question." 105 F.3d at 1481.

[8] JAMS *Comprehensive Arbitration Rules and Procedures* applicable to commercial, real estate and construction cases contain similar language at Rule 30. http://www.jamsadr.com/comprehensive_arb_rules.asp.

[9] Similarly, JAMS *Minimum Standards of Procedural Fairness Policy on Financial Services Arbitrations* provide that "With respect to the cost of the arbitration, the procedure must allocate costs in a way that does not preclude access by the consumer to the procedures" at Rule 6. http://www.jamsadr.com/fin_minimum_stds.asp.

neutrality will not be affected by the fee arrangements" and requires the employer to "make clear that the employee has the *right* to contribute up to one-half of all administrative and arbitrator fees and expenses." *Id.* (emphasis added). JAMS, too, endorses the *Due Process Protocol. Id.* at § D.

Indeed, the federal government also has supported fee-sharing for employment arbitrations. When the U.S. Department of Labor proposed a pilot program to explore the use of alternative dispute resolution under the laws it enforces, it expressly supported fee-splitting and inquired whether any other option would even be a good idea:

> The Department believes that requiring the parties to share the fees and expenses of the mediator or arbitrator helps ensure impartiality. In cases in which the Department is a party or a participant, DOL generally expects that it would pay one-half of the mediator or arbitrator's fees and expenses. The Department invites comment on whether permitting the negotiation of a different arrangement is advisable. To reduce the possibility of bias based on disparate contributions, payment would be forwarded to the mediator or arbitrator by the sponsor of the roster (or by the Department, when it is not a party or participant), without disclosing the parties' respective shares.

Expanded Use of Alternative Dispute Resolution in Programs Administered by the Department of Labor, 62 Fed. Reg. 6690, 6694 (February 12, 1997).

Not surprisingly, then, both reports by the U.S. General Accounting Office (GAO) on the degree of use of alternative dispute resolution in private employment observe that cost-sharing is the norm. In preparing a 1995 report to Congress based on a random sample of 2,000 private sector employers, the GAO followed up with companies that reported using arbitration, and compared those companies' policies to the quality standards identified by the Dunlop Commission.

Employment Discrimination: Most Private-Sector Employers Use Alternative Dispute Resolution, United States General Accounting Office, GAO/HEHS-95-150 (July 1995) at 2-3. The GAO reported that, of the nineteen policies reviewed that addressed costs, fifteen provided for some contribution by the employee:

> To ensure impartiality of the arbitrator, the Commission proposes that both the employee and the employer contribute to the arbitrator's fee. Ideally, the employee contribution should be capped in proportion to the employee's salary to avoid discouraging claims by low-wage workers.
>
> Seven policies do not address cost sharing. In four policies, the employer pays for all arbitration costs; costs are to be shared equally in nine policies; and the employee share is either capped or limited to less than half the costs in the remaining six policies. For example, one employer pays all costs in excess of $50. Another firm pays 80 percent of the arbitration costs, while the employee is responsible for 20 percent.

Id. at 14.

Two years later, the GAO profiled the alternative dispute resolution programs of five private sector employers, as well as those of six federal agencies. *Alternative Dispute Resolution: Employers' Experiences With ADR in the Workplace*, United States General Accounting Office, GAO/GGD-97-157 (August 1997). The GAO reported that *all five* of the companies it studied "required their employees to share in the costs of arbitration." *Id.* at 24. One requires only a $50 processing fee, *id.* at 38, one requires an employee contribution of $100 towards expenses, which is refunded if the employee prevails, *id.* at 46-47, one provides for equal shares but will cap the cost at two weeks net pay in cases of hardship, *id.* at 43, one divides costs equally but allows the arbitrator to make the final allocation, *id.* at 49-50, and one

pays all costs if the employee prevails and shares costs equally if the employee does not, but caps the employee's share at two days' base pay. *Id.* at 53-54.

The D.C. Circuit in *Cole* scoffed at the concern that payment of the arbitrator's fee by the employer would compromise the neutrality of the process. 105 F.3d at 1485. The concern is not necessarily that all arbitrators are potentially unethical and bound to rule in the direction of their paychecks, although such an outcome is conceivable. On the contrary, however, the relevant concern may be the far likelier occurrence that an employee will *perceive* the process as biased if the employer pays the "judge." *See* Russell Evans, *Engalla v. Permanente Medical Group, Inc.: Can Arbitration Clauses in Employment Contracts Survive a "Fairness" Analysis*, 50 Hastings L.J. 635, 665 (March 1999) (noting that "the perception of arbitrator partiality could arise where the employer alone pays all arbitration costs and fees").

As a practical matter, any party who knows that the arbitrator is being paid entirely by the other side cannot help but question whether he or she is getting a fair hearing. Where the rights involve statutory claims of employment discrimination, for example, the employee undoubtedly will view the entire process, from inception to outcome, as dominated and controlled by the employer who from the beginning is footing the bills. This explains, for example, positions such as that of JAMS, which requires that the employee be *permitted* to pay his or her fair share of the costs if so inclined. So, too, the Department of Labor's inquiry whether allowing the parties to negotiate some payment scheme *other than* fifty-fifty would ever be advisable.

The success or failure of an employer's internal arbitration program is dependent in large part upon both parties' faith in the fairness and neutrality of the process. For this reason, it makes far more sense to provide for each party to be

responsible at the outset for some of the cost, subject to a final allocation by the arbitrator in the award. Only in this way can each party feel that he or she is an equal participant in a neutral forum.

The availability of judicial review then serves as a safeguard against the imposition of unreasonable fees, as the First Circuit pointed out in *Rosenberg*. 170 F.3d at 16. *See also Koveleskie*, 167 F.3d at 366. This Court already has concluded that "although judicial scrutiny of arbitration awards necessarily is limited, such review is sufficient to ensure that arbitrators comply with the requirements of the statute." *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 232 (1987) (quoted in *Gilmer*, 500 U.S. at 32 n.4).

Given the prevailing wisdom that each party to an arbitration agreement can reasonably be expected to bear some of the cost, the court below erred in concluding that an arbitration clause that does not allocate fees is unenforceable.

CONCLUSION

For the reasons set forth above, the *amicus curiae* EEAC respectfully submits that the decision below should be reversed.

Respectfully submitted,

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June 2000